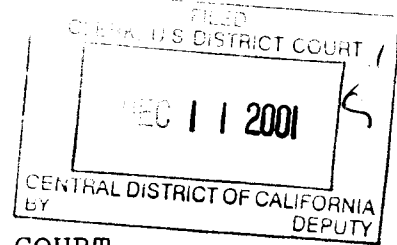


1 MONTEZ DAY  
REGISTER #12291-076  
2 UNITED STATES PENITENTIARY, LOMPOC  
3901 KLEIN BOULEVARD, J-UNIT  
3 LOMPOC, CALIFORNIA 93436



4  
5 UNITED STATES DISTRICT COURT  
6 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
7

8 UNITED STATES OF AMERICA, )

9 Plaintiff, )

10 v. )

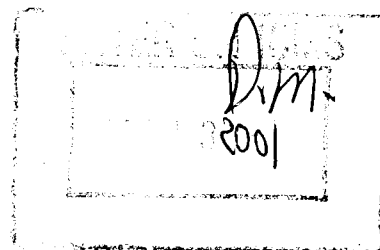
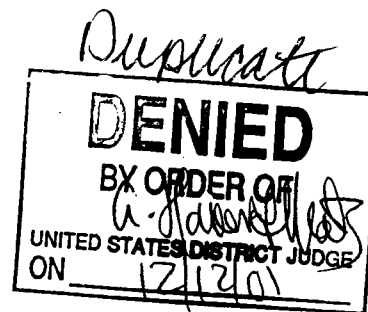
11 MONTEZ DAY, )

12 Petitioner, )  
13 \_\_\_\_\_ )  
14  
15

No. CV 00-11896-AHM  
(No. CR 99-123-AHM)✓

**MOTION FOR RECONSIDERATION**  
**PURSUANT TO FEDERAL RULES OF**  
**CIVIL PROCEDURE, RULE 60 (b)**

16 The Petitioner comes before this Court Pro se, and moves this  
17 Honorable Court for Relief from judgment/order of November 30,  
18 2001, and request Reconsideration of 28 U.S.C. §2255 issues  
19 Pursuant to Federal Rules of Civil Procedure, Rule 60 (b).  
20 //  
21 //  
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MEMORANDUM OF POINTS AND AUTHORITIES

I

FACTUAL BACKGROUND

In 1999, Petitioner, MONTEZ DAY was indicted for robbing "HOME SAVINGS OF AMERICA"... On May 14, 1999, Petitioner pled guilty to all counts surrounding the alleged bank robbery and was sentence to 24 years. On November 30, 2001 this Court denied Petitioner's Section 2255 Motion.

Pending before this Court is Petitioner's MOTION FOR RECONSIDERATION pursuant to Federal Rules of Civil Procedure 60 (b).

A motion for reconsideration under Federal Rules of Civil Procedure 60 (b) must based on one of three grounds: 1) Intervening change of controlling law; 2) New evidence not previously available; or 3) A need to correct a clear error of law or to prevent manifest injustice. See ATKINS v. MARATHON LETOURNEAN CO., 130 F.R.D. 625, 626 (S.D.Miss. 1990) (citing NATURAL RESOURCES DEFENSE COUNCIL v. UNITED STATES ENVTL. PROTECTION AGENCY, 705 F.Supp. 698, 702 (D.D.C.)). The decision whether to grant or deny the motion is entrusted to the sound discretion of the district court. See RODGERS v. WATT, 722 F.2d 456, 460 (9th Cir. 1983) (en banc).

The issue in this motion for reconsideration under 60 (b) is appropriate based on "A need to correct a clear error of law (and/or) to prevent manifest injustice, and Newly discovered evidence.

## II

LEGAL ARGUMENTS

Petitioner was convicted of three (3) counts surrounding a Robbery of "Home Savings Of America". The crime of Bank Robbery has as an essential element a proper showing of Federal Deposit Insurance Corporation insurance. See UNITED STATES vs. SCHULTZ, 17 F.3d 723 (5th Cir.1994) (stating proof of Federal Deposit Insurance Corporation insurance is not only an essential element of the crime, but it is also essential for the establishment of Federal Jurisdiction). See also 18 U.S.C. §2113(a) and (f) "(a) whoever, by force and violence, or by intimidation takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to or in the care, custody, control, management, or possession of any Bank, Credit Union, or any Savings and Loan Association;"

"(f) as used in this section the term "Bank" means any member Bank of the Federal Reserve System, and any Bank, Banking association, Trust company, Savings Bank, or other Banking institution organized or operating under the laws of the United States including a Branch or agency of a Foreign Bank (as such terms are defined in paragraphs (1) and (3) of section (b) of the International Banking Act of 1978), and any institution the deposit of which are insured by the Federal Deposit Insurance Corporation."

It could be inferred from the language of subsection (f) that the institution referred to in 18 U.S.C. §2113(a). That the requisite element to establish the crime of Bank Robbery would be

1 the institution be a member of the Federal Reserve System and  
2 insured by Federal Deposit Insurance Corporation.

3 The instant case at hand is void of both these requirements  
4 to support Petitioners conviction. It can be glean from the  
5 attached Exhibits that the government has not and cannot prove the  
6 jurisdictional element required to sustain this conviction.

7 Petitioner was indicted for crimes committed against a  
8 non-operating institution with inactive or no insurance. See  
9 Exhibit "A" which is a Federal Deposit Insurance Corporation  
10 Confirmation and Report, showing that "Home Savings Of America",  
11 became inactive as of October 03, 1998. This document shows that  
12 Petitioner's conviction was obtained without jurisdiction and based  
13 on a fatally defective indictment.

14 Petitioner's Indictment alleges that on or about January 26,  
15 1999, Petitioner by force, violence, and intimidation, knowingly  
16 took from "Home Savings Of America", 301 South MacLay Street, San  
17 Fernando California, a Savings and Loan association the deposits  
18 of which were then insured by Federal Deposit Insurance  
19 Corporation.

20 In UNITED STATES vs. FITZGERALD, 882 F.2d 397,399 (9th Cir.1989)  
21 The court stated: according Fed. R. Crim. P.7, an indictment must  
22 be a plain, concise, definite written statement of the **essential**  
23 **facts** constituting offense charged. Fed. R. Crim. P.7(c)(1) "the  
24 instrument must set forth the elements of the offense charged and  
25 contain a statement of the facts and circumstances that will inform  
26 the accused of the elements of the specific offense." UNITED STATES  
27 vs. MARTIN, 783, F.2d 1449, 1452 (9th Cir. 1986)

28 In the instant case the indictment alleges a crime that could

1 not possibly been committed. Petitioner was charged with robbing  
2 a financial institution, which on the date of alleged, was closed  
3 or inactive on that date. See Exhibit "A".

4 During Petitioner's Plea colloquy or change of plea hearing,  
5 the government had Petitioner agree that the institution allegedly  
6 robbed was a federally insured institution (FDIC). Exhibit "B",  
7 which is a Declaration by a FDIC Attorney, dated February 21, 2001,  
8 indicates that the Bank known as "Home Savings Of America" was  
9 acquired by another bank "Washinton Mutual Bank" on October 03,  
10 1998, months prior to the date of the alleged robbery.

11 This communication, stipulation or agreement is in valid under  
12 the circumstances. First, it was done unitelligently, due to lack  
13 of advise from counsel. Second, it violates Fed. R. Crim. P. Rule  
14 11(f), which provides "notwithstanding the acceptance of a plea  
15 of guilty, the court should not enter a judgment upon such plea  
16 without making such inquiry as shall satisfy it that there is a  
17 factual basis for the plea."

18 This requires finding sufficient evidence to conclude that the  
19 conduct admitted by the defendant constitutes the offense charged.  
20 UNITED STATES vs. BAKER, 618 F.2d 589, 592(9th Cir.1982) the  
21 purpose of the rule is to protect a defendant who pleads with an  
22 understanding of the charges, but "without realizing that his  
23 conduct does not actually fall within the definition of the crime  
24 charged" UNITED STATES vs. ANGELES-MASCOTES, 206 F.3d 529(5th  
25 Cir.2000).

26 Under Fed. R. Crim. P.11, before a plea may be accepted, the  
27 district court must "address the defendant personally in open court  
28 and inform the defendant of, and determine that the defendant

1 understand ,... the nature of the charge to which the plea is  
2 offered..." Fed. R. Crim. P.11(c)(1) "omitting to tell the  
3 defendant of an essential element of the offense entails a complete  
4 failure to inform the defendant of the nature of the offense to  
5 which he pleads", in violation of Rule 11(c)(1). UNITED STATES vs.  
6 GREEN, 882 F.2d 999, 1005(5th Cir.1989) (citation omitted); see also  
7 UNITED STATES vs. SMITH, 184 F.3d 415, 417(5th Cir.  
8 1999) (reiterating rule). Likewise, the constitution also requires  
9 that "the Defendant receive []"real notice of the true nature of  
10 the charge against him, the first and most universally recognized  
11 requirement of due process," HENDERSON vs. MORGAN, 426 U.S. 637,  
12 645 (1976), quoting SMITH vs. O'GRADY, 312 U.S. 329. 334 (1941) A  
13 notice that requires a description of the essential elements of the  
14 plea offense, at least where the elements are "critical". see id.  
15 at 647 N.18.

16 In viewing the record neither the government nor the court ever  
17 informed Petitioner that the government was required to prove  
18 jurisdiction (FDIC) if the case were to go to trial, which clearly  
19 violates Fed. R. Crim. P. 11 see also UNITED STATES vs. SCHULTZ, 17  
20 F.3d 723 (5th Cir. 1994).

21 SWEETON vs. BROWN, 27 F.3d 1162, 1169(6th Cir. 1994) (citing  
22 UNITED STATES vs. SIVIGLA, 689, F.2d 832, 835(10th Cir.1981), cert.  
23 denied, 461 U.S. 918, 103 s.ct. 1902, 77 L.ed. 2d. 289(1983)  
24 stating "lack of jurisdiction cannot be waived and jurisdiction  
25 cannot be conferred upon a federal court by consent, inaction or  
26 stipulation... A court lacking jurisdiction cannot render judgment  
27 but must dismiss the cause at any stage of the proceedings in which  
28 it becomes apparent that jurisdiction is lacking."

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Respectfully submitted,  
Montez Day

Montez Day

# **EXHIBIT "A"**

## Home Savings of America, FSB

4900 Rivergrade Road

Irwindale, CA 91706

FDIC Certificate # 15919 Bank Charter Class: SA

Primary Federal Regulator: OTS

Primary Internet Web Address: Web site not available

Demographic Information As Of: February 6, 2001

### This is an inactive institution

Inactive as of: October 3, 1998  
Closing history: Merged without Assistance into  
Acquiring institution: Washington Mutual Bank, FA - (32633)

### Report Selection:

Assets and Liabilities - \$ Amount

### Report Date:

September 30, 1998

Research@fdic.gov

Last Updated: 2/16/2001

[Research@fdic.gov](mailto:Research@fdic.gov)

[Sitemap](#) | [Search](#) | [Help](#) | [Home](#)

## **EXHIBIT "B"**



Federal Deposit Insurance Corporation

550 17th Street NW, Washington, DC 20429

Office of Executive Secretary

Mr. Montez Day  
#12291-076 "J" Unit  
United States Penitentiary  
3901 Klein Boulevard  
Lompoc, California 93436

FEB 21 2001

FDIC Log # 01-0058

Dear Mr. Day:

This will respond to your letter dated January 16, 2001, pursuant to the provisions of the Freedom of Information Act ("FOIA," 5 U.S.C. § 552), for information with regard to Home Savings of America, 301 South Maclay, San Fernando, California 91340. You specifically ask the following questions: (1) Is this bank a member of the Federal Reserve System? If so, list date when it became a member and send a copy of the certificate. (2) Is this bank chartered in the state of California? (3) Is this bank a member of the Federal Deposit Insurance Corporation? If so, list date and send a copy of the FDIC certificate. (4) Is this bank a national bank branch? Please send status of this bank.

The FOIA does not require an agency to answer questions, but rather to provide copies of releaseable documents in response to requests for the same. In an attempt to assist you, however, in this one instance, we will address the questions you pose as well as the document requests.

FDIC records show that Home Savings of America, FSB, Irwindale, California, with the branch you list located at 301 South Maclay Avenue, San Fernando, California, became insured by the FDIC on January 1, 1934. It is a savings association (and not a national bank) which was insured by the FDIC, but was supervised and regulated by the Office of Thrift Supervision ("OTS.") The OTS should be consulted with regard to your questions on the chartering of this bank, at the following address:

Office of Thrift Supervision  
Ms. Mary Ann Reinhart  
Senior Program Specialist/FOIA  
1700 G Street, N.W.  
Washington, D. C. 20552

I note that on October 3, 1998, Home Savings of America, FSB merged, without assistance, into Washington Mutual Bank, FA, Stockton, California, which is presently an open and operating FDIC-insured savings association. Enclosed please find several printouts with regard to these banks.

With regard to whether or not Home Savings of America, FSB was a member of the Federal Reserve System, you should write directly to the Board of Governors of the Federal Reserve System at the following address:

- 2 -

Board of Governors of the Federal Reserve System  
Ms. Martha Connor  
FOIA Office  
20<sup>th</sup> & C Streets, N.W., Room MP500  
Washington, D. C. 20551

Upon admission to the FDIC, as a courtesy only, Home Savings of America, FSB was issued an FDIC certificate of insurance. This certificate is not an official record of the FDIC required to be kept by law or regulation, and copies are not retained. Therefore, there is no certificate of insurance to provide for your request.

Federal deposit insurance covers depositors against losses incurred through the insolvency of an institution. It **does not** cover an institution for losses incurred as a result of theft or robbery. Any such claim, therefore, would not be reimbursed by the FDIC. Such insurance is obtained under a bond or through a private insurance carrier chosen by each bank. You may request that an institution provide you with the name of its bondholder or carrier, but they are not required to do so nor are they required to supply the FDIC with that information. Enclosed please find a copy of "Your Insured Deposit," which will provide you with other helpful information on FDIC insurance.

This concludes the processing of your request. Our FOIA regulations at 309(f)(iii) state that as an individual requester, you are entitled to 2 free hours of search and 100 free pages of duplication in making your request (copy enclosed). In processing your request, we have expended the 2 free hours of professional search time to which you are entitled. Our FOIA regulations further state that multiple requests seeking similar or related records from the same requester or group of requesters will be aggregated for the purpose of [fees]. Therefore, any future requests which you may choose to make on the subject of the insurance status of this institution will be subject to the assessment of fees, and should include your agreement to pay such fees, whether or not any information is found or if found, is released. For your reference, enclosed please find a copy of our fee schedule.

As there is no copy of the FDIC insurance certificate to provide for your request, you may choose to treat our response as a partial denial of your request and appeal to the FDIC's General Counsel within 30 business days following receipt of this letter. Should you decide to appeal, please submit your appeal in writing to the Office of the Executive Secretary. Please refer to the FDIC log number and include any additional information that you would like the General Counsel to consider.

Sincerely,



Fredrick L. Fisch  
Senior Attorney

Enclosures

# *CERTIFICATE OF SERVICE*

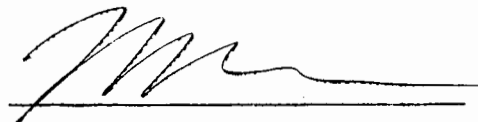
I, MONTEZ DAY hereby certify that I have served a true and correct copy of the following:

MOTION FOR RECONSIDERATION PURSUANT TO FEDERAL  
RULES OF CIVIL PROCEDURE, RULE 60 (b).

Which is deemed filed at the time it was delivered to prison authorities for forwarding to the court, Houston v. Lack, 101 L.Ed.2d 245 (1988), upon the court and parties to litigation and or his/her attorney(s) of record, by placing same in a sealed, postage prepaid envelope addressed to:

ASSISTANT UNITED STATES ATTORNEY  
ANDREW BROWN, ATTORNEY  
312 NORTH SPRING STREET  
LOS ANGELES, CALIFORNIA 90012

and deposited same in the United States Postal Mail at the United States Penitentiary, Lompoc, California, on this: 06 day of: December, 2001.



Montez Day #12291-076  
3901 Klein Boulevard  
Lompoc, California 93436